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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MCI COMMUNICATIONS CORPORATION AND MCI TELECOMMUNICATIONS CORPORATION,

Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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September 9, 1983

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AT&T's brief in opposition highlights the need for this Court to grant MCI's petition and clarify the standards of proof for predatory pricing and antitrust damages.[1]

[1] Defendant American Telephone and Telegraph Company is referred to in this reply as "AT&T". Plaintiffs MCI Communications Corporation and MCI Telecommunications Corporation are referred to as "MCI". Citations to the court of appeals' opinion are to the Appendix filed with MCI's petition, and all citations conform to the conventions used in the petition. (Petition 1 n.2.)

The statement required by Rule 28.1 appears at page ii of MCI's petition.

ARGUMENT

In urging denial of MCI's petition, AT&T relies upon the Seventh Circuit's supposed "alternative grounds" that the evidence was insufficient to support the jury's predatory pricing and damages findings. But the court of appeals' rulings on evidence were not independent of its legal errors. The evidence rulings embodied the same errors on the legal standards for proof of predatory pricing and antitrust damages that MCI challenges in its petition.

I. This Court Should Establish The Proper Standard Of Proof For Predatory Pricing.

MCI contends that the court of appeals majority improperly reversed the jury's finding that AT&T used predatory pricing as one of several techniques willfully to maintain its monopoly. The court of appeals majority erred by severing consideration of MCI's price-cutting allegations from all the other evidence of AT&T's monopolistic intent and by imposing a restrictive test to encourage monopolists' price cutting. (Petition 7.)

Applying its erroneously narrow test, the court of appeals majority also concluded that MCI's evidence was insufficient to prove below-cost pricing. The court of appeals mistakenly assumed that prices had to be below some cost measure to be part of a predatory scheme. (*See* Petition 8, 10.) Further, the court applied an improper standard to MCI's evidence of below-cost pricing, saying that the testimony and exhibits did not "reflect the sort of analysis and presentation necessary to support a claim of predatory pricing." (Op., App. 73a.) The court reviewed MCI's pricing assertions as if they involved separate statutory violations burdened with a higher standard of proof. This error caused the court to reexamine the evidence under an impermissibly restrictive standard. (Op., App. 71a-76a; Dissent, App. 188a-91a.) *See Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, 700-01 (1962).

As Judge Wood pointed out in dissent, the majority's strict standard for proof of predatory pricing would endanger private enforcement of the Sherman Act:

> As with its assessment of the proof of damage evidence, the majority would subject competing evidence to exacting mathematical scrutiny, a practice which will, I fear, make recovery for antitrust violations virtually impossible in many cases.

(Dissent, App. 189a; *see* Petition 10-11, 16.) The majority's "alternative ground" confirms the need for this Court to consider the standard of proof for predatory pricing.

II. This Court Should Correct The Court Of Appeals' Erroneous Interpretation Of *Brunswick*.

As pointed out in MCI's petition, the court of appeals improperly applied *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), to reverse the jury's damage award. (Petition 13-15.) The majority interpreted *Brunswick* to require proof not only that the plaintiff's antitrust harm was caused by the defendant's unlawful conduct, but also that the illegal conduct was the *sole* cause of each dollar of damages claimed. (Petition 14.) This standard conflicts with this Court's holdings before and after *Brunswick* that proof of antitrust damages for market exclusion need not be mathematically precise. (Petition 12-15.)

AT&T argues that the court of appeals' interpretation of *Brunswick* was not determinative, characterizing the court's finding of insufficient evidence to support the lost profits study as an independent ground for the reversal of damages. (AT&T Brief in Opposition 13.)

But the majority's rejection of MCI's study flowed directly from its improper *Brunswick* analysis. The majority found that the study's revenue assumption "falls as a result of [AT&T's pricing] being determined to be lawful." (Op., App. 150a.) This reexamination of MCI's revenue assumption in light of the pricing determinations could only be

permissible if the majority's *Brunswick* analysis were correct. Under the standard of review required by this Court's antitrust rulings, which puts the burden of uncertainty on the guilty defendant, "sufficient evidence" supported the reasonableness of the study's assumptions. (Dissent, App. 204a-08a.)

CONCLUSION

The "alternative grounds" which AT&T contends insulate the court of appeals' legal errors from review are part and parcel of the errors to which MCI's petition is addressed. MCI urges the Court to grant its petition for certiorari.

Respectfully submitted,

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